81-2206

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ALEXANDER L. STEVAS,
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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1981

STATE OF ALABAMA,

Petitioner

v.

HOWARD L. DICKERSON,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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ATTORNEYS FOR APPELLEE

QUESTIONS PRESENTED

1. Whether or not a federal appellate court can supplement the record on appeal with evidence not before the federal district court.

2. Whether an evidentiary hearing should have been held to determine whether a missing witness would have in fact given alibi testimony.

PARTIES

In the United States District Court for the Northern District of Alabama and the United States Court of Appeals for the Eleventh Circuit, the parties were Howard L. Dickerson, Respondent herein, and the State of Alabama, Petitioner herein.

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OPINIONS BELOW

The judgment of the Alabama Court of Criminal Appeals is found in Appendix D. The memorandum opinion and judgment of the United States District Court for the Northern District of Alabama is found in Appendix A. The decision and denial of rehearing of th Eleventh Circuit Court of Appeals is found in Appendix B.

JURISDICTION

The order of the United States Court of Appeals reversing the District Court's judgment was issued on February 16, 1982. Rehearing was denied on March 30, 1982, and this petition is filed within sixty days of that date.

The jurisdiction of this Honorable Court is invoked under 28 United State Code, Section 1224(1).

STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, Section 2254, the same being voluminous is submitted as Appendix C hereto.

STATEMENT OF THE CASE

The Federal District Court of the Northern District of Alabama entered an order denying Appellant's petition for habeas corpus without an evidentiary hearing. After oral argument the Circuit Court of Appeals for the Eleventh Circuit supplemented the record with the state trial court transcript which was not in evidence before the federal district court and then reversed this case on that evidence.

STATEMENT OF THE FACTS

Howard Luther Dickerson was found guilty of robbing Eugene McCamy who identified Dickerson as the robber at trial. Dickerson's defense was that he was elsewhere at that time and subpoenaed George Echols, an Anniston police officer, as an alibi witness. Although Echols was served and an attachment was issued, he never appeared. At this time no one knows to what Echols would have testified had he been present.

SUMMARY OF ARGUMENT

It is not proper for a federal appellate court to supplement the record after oral argument on appeal and then reverse on the basis of that evidence. This is especially true where there are factual issues still unresolved as in this case where the Eleventh Circuit reversed because an alibi witness did not testify at trial and yet it is still not known whether the witness would have actually testified that Dickerson was in another city at the time of the crime.

REASONS FOR GRANTING THE WRIT

I.

A FEDERAL APPELLATE COURT CAN NOT SUPPLEMENT THE RECORD ON APPEAL WITH EVIDENCE NOT BEFORE THE FEDERAL DISTRICT COURT. (Conflict between Circuit Courts of Appeals)

On appeal after oral argument the Circuit Court supplemental the record with the state trial court transcript which was not in evidence before the federal district court and then reversed this case on that evidence, instead of remanding the case to federal district court for an evidentiary hearing. Remanding for an evidentiary hearing would have allowed not only for the state court transcript to be made officially part of the record, but would have also allowed the State to produce evidence which could affect the transcript's materiality (i.e. an affidavit from the missing witness stating what his testimony would have been).

In the first place, failure to remand for an evidentiary hearing specifically violates the procedures established in Burgett v. State of Alabama, 516 F. 2d 524 (5th Cir. 1975) and Washington v. Beto, 424 F. 2d 1035 (5th Cir. 1970).[1] In those cases there was no transcript of the state proceedings in the appellate record and it was felt that essential facts were missing. Therefore, the cases were remanded to the district court for a review of the transcript of the state proceedings and/or an evidentiary hearing on the ground that the district court should consider the facts first.

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1. The new Eleventh Circuit has adopted as its precedent the case law of the former Fifth Circuit. Bonner v. City of Prichard, Alabama, 661 F. 2d 1206 (11th Cir. 1981).

Secondly, the State contends that the precedent of supplementing a record by an appellate court is one of exceptional importance which should be considered by the Supreme Court and that the better precedent is the one observed in the Seventh and Eighth Circuit Courts of Appeals.

In U.S. ex rel Kellogg v. McBee, 452 F. 2d 134 (7th Cir. 1971), the Circuit Court refused to allow in a habeas corpus appeal the United States government to supplement the appellate record and held that Rule 10(e), Federal Rules of Appellate Procedure, does not give the authority to admit on appeal a document, file, or series of papers which neither were introduced into evidence, nor, in any manner, made a part of the record in district court. Other Seventh Circuit cases were also cited as precedent.

In Ayers v. Ciccone, 431 F. 2d 724 (8th Cir. 1970), that Circuit Court also refused to allow before it matters which were not presented to the district court to comprise part of the record evidence and this too was a habeas corpus case.

On the other hand, none of the cases cited in the Eleventh Circuit's opinion as authority were habeas corpus cases. The cite to Erkins v. Bryan, 663 F. 2d 1048 at 1052 n. 1 (11th Cir. 19810 (a case construing the Landrum-Griffin Act) reveals that no authority was cited for the precedent and that after Appellee quoted parts of a constitution in affidavits, the Appellant made a motion to have the entire constitution put in evidence, which was granted when the Appellees did not object. The other cases cited by the panel were either Second or D.C. Circuit cases dealing with direct appeals of federal criminal convictions

where the supplemented materials were preliminary proceedings in their own district courts or materials prepared by United States Attorneys used in connection with the conviction in federal district Court. United States v. Aulet, 618 F. 2d 182 (2nd Cir. 1980); Turk v. United States, 429 F. 2d 1327 (8th Cir. 1970); Gatewood v. United States, 209 F. 2d 789 (D.C. Cir. 1953).

Lastly, the State urges overruling the Eleventh Circuit's action on the ground that this violates the spirit of Cuyler v. Sullivan, 428 U.S. 106, 121 (1976) which provides that a federal appellate court is justified in resolving an issue not passed on below where the proper resolution is beyond any doubt or where injustice might otherwise result. In this case the proper resolution is not beyond any doubt and injustice has resulted. By reversing this case on the

trial transcript and failing to remand for an evidentiary hearing the Circuit Court has precluded the State from obtaining an affidavit from the missing witness stating what his testimony would have been. If the witness states that if he had been present at the original trial he would not have given the Dickerson an alibi, it would seem that a retrial of the Dickerson would be unnecessary and an injustice to the State would result from the grant of the writ of habeas corpus.

II.

AN EVIDENTIARY HEARING SHOULD HAVE BEEN HELD TO DETERMINE WHETHER A MISSING WITNESS WOULD HAVE IN FACT GIVEN ALIBI TESTIMONY

(Conflict with controlling decision)

In Townsend v. Sain, 372 U.S. 293 (1963), this Court held that an evidentiary hearing must be held if the

material facts were not adquately developed at the state court hearing. As mentioned in the previous argument, it is unknown as to whether the missing witness' would have actually bolstered Dickerson's alibi defense if he had testified. Certainly this is a material fact which must be developed before a decision can be made on the merits of this case.

CONCLUSION

In conclusion the Petitioner respectfully submits that this case presents important questions oflaw involving conflicts between the Circuit Courts of Appeal and with prior decisions of the Court. For these reasons the Petitioners pray that this Honorable Court will isse the writ of certiorari and review the decision and opinion of the Honorable Court of Appeals and on such review will reverse the decision of said Court.

Respectfully submitted,

Charles A. Graddick

CHARLES A. GRADDICK
ATTORNEY GENERAL

Elizabeth Ann Evans

ELIZABETH ANN EVANS
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Elizabeth Ann Evans, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for State of Alabama, Petitioner, do hereby certify that on this 28th day of May, 1982, I did serve the requisite number of copies of the foregoing on the Attorney for Howard Luther Dickerson, Respondent, by mailing same to them, first class postage prepaid and addressed as follows:

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FULFORD, POPE & MINISMAN
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Elizabeth Ann Evans

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IN THE SUPREME COURT OF THE
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STATE OF ALABAMA,

Petitioner

V.

HOWARD LUTHER DICKERSON,

Respondent

APPENDIX

TO THE PETITION FOR A WRIT OF
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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

HOWARD LUTHER DICKERSON,	)	
	)	
Petitioner,	)	
	)	
-VS-	)	CV-80-A-5068-NE
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

J U D G M E N T

In conformity with the Memorandum Opinion filed contemporaneously herewith, it is hereby

ORDERED, ADJUDGED and DECREED that the petition for habeas corpus filed by Howard Luther Dickerson be and the same hereby is DENIED.

DONE this 19th day of May, 1980.

C. W. ALLGOOD
SENIOR JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

HOWARD LUTHER DICKERSON,	)	
	)	
Petitioner,	)	
	)	
-VS-	)	CV-80-A-5068-NE
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

Howard Luther Dickerson, petitioner, is an inmate of the Fountain Correctional Center, Holman Station, Alabama. Petitioner has submitted to this court a petition for habeas corpus in which he attacks a sentence imposed upon him in the Circuit Court of Jackson County, Alabama, at Scottsboro. Petitioner was sentenced to imprisonment for a period of thirty (3) years after having been convicted of robbery in the Circuit Court of Jackson County. Following petitioner's conviction, a direct appeal was perfected on his behalf. Petitioner's conviction

was affirmed by the Alabama Court of Criminal Appeals, 362 So.2d 1322 (1978). Petitioner states that certiorari was denied by the Alabama Supreme Court.

In addition to many other state court proceedings questioning the validity of his detention, petitioner filed a petition for writ of error coram nobis in the Circuit Court of Jackson County, Alabama, on which he was given an evidentiary hearing. Relief was denied, and the decision to deny coram nobis relief has been affirmed by the Alabama Court of Criminal Appeals.

In his petition for habeas corpus, petitioner makes the following allegations as a basis for his contention that his present detention is in violation of the Constitution:

1. Prospective juror failed to disclose her employment in the Scottsboro

Police Department and possible knowledge of the police files concerning petitioner's case.

2. An individual by the name of Hugh W. Teat has admitted committing the offense for which petitioner was convicted and has exculpated petitioner.

3. Prejudicial statement by the prosecution in closing argument in referring to petitioner as a cold-blooded professional criminal.

4. Petitioner was denied continuance.

5. Failure of prosecution to establish a prima facie case.

6. Subjected to impermissibly suggestive photograph identification.

7. Petitioner not adequately represented by counsel.

Each issue raised by petitioner has been decided adversely to him by the Alabama Court of Criminal Appeals on

direct attack with the posible exception of ground No. 2. The only possible qualification of the above statement is petitioner's allegation of inadequate representation by counsel during trial. This ground was also raised by petitioner in his coram nobis petition. No evidence was offered nor any averments made by petitioner to support this allegation other than suggestion that his trial counsel lacked diligence in ensuring that witnesses had been subpoenaed for the defense. The Alabama Court of Criminal Appeals has treated this issue and disposed of petitioner's contentions adverely to him. In a state habeas proceeding initiated by a state prisoner pursuant to 28 U.S.C. §2254, the United States District Court does not sit as a super court of appeals to review the decisions of the Appellate Courts of the State of Alabama. The decision of the

Alabama Court of Criminal appeals in affirming petritioner's conviction is adequately supported by the record, and the findings made by the Alabama Court of Criminal Appeals were made with due regard to the Constitutional rights of petitioner. This court will not substitute its judgment for that of the Appellate Courts of the State of Alabama.

Petitioner's allegation that another individual has confessed to the crime for which petitioner was convicted and was exculpated petitioner was brought before the Circuit Court of Jackson County; and with respect to this issue, petitioner was afforded a full, fair and complete evidentiary hearing. "[T]he existence of newly discovered evidence relevant to the guilt of a state prisoner is not ground for relief on habeas corpus." Townsend v. Sain , 372 U.S. 293, 317, (1963).

> "Questions of guilt or innocence are not matters to be considered upon petition for habeas corpus.... Newly discovered evidence in the form of a confession by another does not render the conviction void and subject to collateral attack by habeas corpus because it goes to the merits of the conviction, not to its legality....[T]he confession might be urged as the proper subject for executive clemency, but is affords no basis for judicial action."

Shaver v. Ellis, 255 F.2d 509 (5th Cir. 1958).

The purported confession offered by the petitioner of Hugh W. Teat is not sufficient to require habeas relief. Anderson v. Maggio, 555 F.2d 447 (5th Cir. 1977).

Based on the authorities cited above, it is not appropriate for this court to consider as a basis for federal habeas relief the alleged confession by Hugh W. Teat. This court must point out, however, that in the evidentiary

hearing afforded this petitioner in is coram nobis action the Circuit Court of Jackson County, Alabama had ample basis to conclude that the purported confession of Hugh W. Teat was a complete fabrication.

The confinement of petitioner is not subject to any Constitutional infirmity. All of his Constitutional rights have been carefully protected. It is therefore necessary that this petition for habeas corpus be denied. An appropriate Judgment will be entered.

DATED this 19th day of May, 1980.

C. W. ALLGOOD
SENIOR JUDGE

APPENDIX B

HOWARD L. DICKERSON, Petitioner,

v.

STATE OF ALABAMA, Respondent.

No. 80-7780.

United States Court of Appeals,
Eleventh Circuit.

Feb. 16, 1982.

Petitioner of state prisoner for writ of habeas corpus was denied by the United States District Court for the Northern District of Alabama at Birmingham, Clarence W. Allgood, J., and prisoner appealed. The Court of Appeals, Tuttle, Circuit Judge, held that, in case at bar, each factor to be considered in determining whether defendant's Sixth Amendment right was denied by denial of continuance to obtain presence of witness weighed in favor of defendant, and thus failure by trial court to grant

continuance violated Sixth and Fourteenth Amendment rights to compulsory process.

Reversed and remanded.

1. Criminal Law 1110(1)

Federal appellate courts do not often supplement record on appeal with evidence not reviewed by court below, but authority to do so exists. F.R.A.P. Rule 10(e), 28 U.S.C.A.

2. Habeas Corpus 113(9)

Whether appellate record should be supplemented under particular circumstances of case is matter within discretion of federal courts of appeals, and, under circumstances of case at bar, it was appropriate to include state court trial transcript in record of habeas corpus case. F.R.A.P. Rule 10(e), 28 U.S.C.A.

3. Habeas Corpus 85.1(2)

Factual determinations of state appellate court in habeas corpus

proceedings are to be accorded presumption of correctness only to extent that they are "fairly supported by the reocrd." 28 U.S.C.A. §§2254, 2254(9)(8).

4. Habeas Corpus 90.

Federal court is not bound by state appellate court's determination of question of law or of mixed question of law and fact, and, for such purpose, question whether certain statements were sufficiently definite to constitute request for continuance was, at least, mixed question of law and fact. 28 U.S.C.A. §§2254, 2254(a), (d)(8).

5. Criminal Law 586.

Trial judge's discretionary power to deny motionn for continuance is necessarily limited by Sixth Amendment right to compulsory process and any denial of an attempt by accused to

present testimony in his behalf must be weighed against that right. U.S.C.A.Const.Amend. 6.

6. Habeas Corpus 90.

Determination whether denial of continuance was abuse of discretion so as to violate sixth Amendment right of accused was question of law, for purposes ofrule that fedeal court is not bound by state appellate court's determination of question of law. U.S.C.A.Const.Amend. 6.

7. Criminal Lqw 603(2).

Where before trial defendant properly subpoenaed police officer who failed to appear on day trial was to begin and again on the following day, and court issued attachment for him and at conclusion of testimony defense counsel stated that he didn't feel he could rest until the other material witnesses had testified and where court said that court

didn't know anything furthr to do except hold the case open forever, there was sufficiently definite request for continuance to elicit ruling from state court. U.S.C.A.Const.Amend. 6.

8. Criminal Law 595(4).

Not every denial of motion for continuance to obtain witnesses violates accused's right to compulsory process, but court may not refuse reasonable continuance for obtaining defense witnesses where it has been shown that desired testimony would be relevant and material to defense. U.S.C.A.Const.Amend. 6.

9. Constitutional Law 268(10).

Witnesses 2(3).

In case at bar, each factor to be considered in determining whether defendant's Sixth Amendment right was denied by denial of continuance to obtain presence of witness weighed in favor of

defendant, and thus failure by trial court to grant continuance violated Sixth and Fourteenth Amendment rights to compulsory process. U.S.C.A.Const.Amends. 6, 14; 28 U.S.C.A. §2254.

10. Habeas Corpus 90.

Where on application for habeas corpus relief an issue was raised as to whether juror who typed investigating officer's report prior to trial had any extrinsic knowledge of case, and parties disagreed as to possibility that juror read and remembered report while serving as juror as well as to contents of report, trial court erred in failing to grant evidentiary hearing. 28 U.S.C.A. §2254.

Appeal from the United States District Court for the Northern District of Alabama.

Before TUTTLE, HENDERSON and HATCHETT, Circuit Judges.

TUTTLE, Circuit Judge:

Petitioner Dickerson, an Alabama state inmate, appeals from the denial of his petition for a writ of habeas corpus. Dickerson was arrested and charged with the robbery of approximately seventy-eight dollars worth of "Class A" drugs from a Scottsboro, Alabama drugstore. He was convicted in the Circuit Court of Alabama, Jackson County, and sentenced to imprisonment for a period of thirty years. This conviction was affirmed in a written opinion issued by the Alabama Court of Criminal Appeals. 362 So.2d 1322(Ala.Cr.App.1978). The Alabama Supreme Court denied certiorari on January 16, 1979.

Dickerson then filed a petition for writ of error coram nobis, alleging fifteen grounds in support of his petition. Finding that all but two of these grounds has been decided against

Dickerson on direct appeal, the state court took evidence on the remaining two issues and denied the petition on March 1, 1979. Such denial was affirmed without opinion by the Alabama Court of Criminal Appeals on August 21, 1979. The Alabama Supreme Court denied certiorari on September 25, 1979.

Having exhausted his state couart remedies, Dickerson filed a pro se petition for writ of habeas corpus in the United States District Court for the Northern District of Alabama. This petition alleged seven grounds for reversal of his conviction. After ordering the State of Alabama to transmit a copy of the state court's coram nobis transcript, the district court entered a memorandum opinion denying Dickerson's petition without an evidentiary hearing. The district court found that six of these seven grounds[1] had been decided against

Dickerson in his direct appeal to the Alabama Court of Criminal Appeals, and that the Alabama Court's written opinion was adequately supported by the record.

Dickerson now appeals from the denial of his petition raising two substantive issues.[2] First, he alleges that his Sixth and Fourteenth Amendment rights to compulsory process were violated when the state court refused to grant a continuance to enable him to procure the

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1. The district court found that petitioner's seventh ground, an alleged confession by another, was not an appropriate basis for federal habeas corpus and that in any event, this issue had been properly decided by the Alabama coram nobis court after an evidentiary hearing. This issue was not raised on this appeal.

2. After being denied by the district court, Dickerson's pro se application for certificate of probable cause and for cause to appeal in forma pauperis was granted by this Court on September 17, 1980.

attendance of an alibi witness. Second Dickerson contends that he was deprived of his constitutional right to an impartial jury when it was discovered after trial that one of the jurors who worked in the police department had typed the investigating officer's report in this case.

I. THE RECORD OF APPEAL

Before reaching the merits of Dickerson's claims, we must address the rather unusual problems which have arisen concerning the record in this case. In its order denying Dickerson's petition, the district court stated that the state appellate court's opinion was adequately supported by the reocrd. Upon our review of the record on appeal we discovered that the district court could not have properly made such a determination since the state court trial transcript in this

case was never made a part of the habeas corpus record. Instead, the district court had before it only the transcript of the state coram nobis proceedings which did not conain an independent review of the issues decided by the state appellate court and raised in the federal habeas corpus action.[3] In his appellate brief, Dickerson recites several legally significant facts which can be found in the state trial transcript but which were omitted from the state appellate opinion on which the district court relied.

The State of Alabama has consistently urged us to decide this case on the basis of the materials which were

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3. The district court's oversight in this matter is understandable given the complex history of the case and the pro se nature of the petition. Nevertheless, such an error is, in itself, a sufficient basis for reversal. See Townsend v. Sain, 372 U.S. 293, 318-19, 83 S.Ct. 745, 759-760, 9 L.Ed.2d 770 (1963)1 Valdex v. Californai, 439 F.2d 1405 (9th Cir. 1971); 28 U.S.C. §§2243, 2254 (1976).

originally presented in the record on appeal. Thus, the state would have us ignore the facts in the trial transcript in deciding the merits of this case. The state also contends that we may not correct the district court's oversight by supplementing the record on appeal.[4]

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4. We were somewhat surprized to learn of the state's objection considering that the following colloquy occurred during the oral argument in this case:

STATE COUNSEL: And we were never asked to present the transcript, so it is not part of the record.
COURT: Is it available?
STATE COUNSEL: If you wish it, I could, I would, present it to the Court. I mean, I certainly have no objection because it is not going to say anything different than is said in the Court of Criminal Appeals opinion.

Transcription of the tape recording of the oral argument in Dickerson v. Alabama, No. 80-7780 (Oct. 28, 1981). Accordingly, we directed the state to transmit a certified copy of this record, nearly eight weeks later the state complied with this request and informed us, for the first time, of their objection.

Apparently, the bases for this objection are that the State has never commented on this transcript and that the district court has never had an opportunity to review it.

[1,2] While federal appellate courts do not often supplement the record on appeal with evidece not reviewed by the court below, it is clear that the authority to do so exists.[5] See, e.g.,

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5. The Court of Appeals for the Second Circuit has based this authority on Fed.Rule App.Proc. 10(e) which provides in part that a Court of Appeals may "of its own initiative...direct...that a supplemental record be certified and transmitted." United States v. Aulet, 618 F.2d 182, 187 (2d Cir. 1980). Other circuits have relied primarily on the appellate court's inherent equitable powers to supplement the record as justice requires. See, e.g., Erkins v. Bryan, 663 F.2d 1048, at 1052 n.1 (11th Cir., 1980); Turk v. United States, 429 F.2d 1327, 1329 (8th Cir. 1970). We express no view cocerning the correct interpretation of Rule 10(e). but rely on this Court's inherent equitable powers to supplement the record.

Erkins v. Bryan, 663 F.2d 1048, at 1052 n.1 (11th Cir., 1981); United States v. Aulet, 618 F.2d 182, 187 (2d Cir. 1980); Turk v. United States, 429 F.2d 1327, 1329 (8th Cir. 1970); Gatewood v. United States, 209 F.2d 789, 792-93 (D.C.Cir. 1953). Whether an appeallate record should be supplemented under the particular circumstances of a case is a matter left to the discretion of the federal courts of appeals. Cf. Singleton v. Wulff, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976) (issues raised for the first time on appeal). For several reasons, we view it appropriate to include the state court trial transcript in the record of this case. First, we believe that the proper resolution of the substantive issues in this case, when viewed in the context of all of the relevant historical facts, is beyond any doubt. Id. Second, a decision

to remand this case for the sole purpose of allowing the district court to review the several additional significant facts contained in the transcript would be contrary to both the interests of justice and the efficient use of judicial resources. At least one dispositive issue in this appeal raises a pure question of law and, thus, there is no need for an evidentiary hearing to be held.[6] Counsel for the State of Alabama cannot in good faith contend that they were without notice of the existence of this transcript or of its contents.

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[6] Furthermore, counsel was appointed for Dickerson in this appeal. And, although counsel for the state arguably relied solely on the facts in the state appellate court opinion, see note 4 supra, the issues were fully briefed and argues on the merits.

Finally, it should be remembered that, in effect, we are here reviewing the district court's review of the habeas corpus claim of a state prisoner.[7]

II. THE STANDARD OF REVIEW

When reviewing a federal habeas petition made by a prisoner in state custody, a federal court is required to follow the statutory criteria set forth in 28 U.S.C. §2254 (1976). This statute provides that federal courts are to accord a presumption of correctness to factual determinations made by a state appellate court unless one of eight specific circumstances is found to exist. Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

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7. Federal appellate judges have been granted unique powers in the context of habeas corpus actions. See 28 U.S.C §2254(a) (1976).

[3] The State of Alabama argues that we are foreclosed from finding a constitutional violation in this case because we must apply a presumption of correctness to certain determinations made by the State appellate court. The state's argument regarding the proper application of section 2254 to this case is two-fold. First, the state argues that section 2254 requires this Court to base its decision in this case solely on the facts contained in the state appellate court opinion. We disagree. The factual determinations of a state appellate court are to be accorded a presumption of correctness only to the extent that they are "fairly supported by the record." 28 U.S.C. §2254(d)(8) (1976); Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 769-70, 66 L.Ed.2d 722 (1981); Solomon v. Smith 645 F.2d 1179, 1184 n.2 (2d Cir. 1981); Taylor v. Lombard, 606

F.2d 371, 375 (2d Cir. 1979), cert. denied, 445 U.S. 946, 100 S.Ct. 1346, 63 L.Ed.2d 781 (1980). Our independent review of the state trial transcript reveals that while the state appellate opinion correctly states most of the facts developed at trial, it fails to include several legally significant facts such as the identity of the alibi witness as a police officer and the three witnesses as Dickerson's close relatives or friends. Thus, at least to the extent of the omission of these legally sufficient facts, the state appellate court's decision is not "fairly supported by the record."

[4-6] Second, the state argues that section 2254 requires this Court to presume that the state appellate court's holding is correct. The Alabama Court of Criminal Appeals held alternatively that either the defense counsel's statements

were not definite enough to constitute a request for a continuance or that the trial court did not abuse its discretion in denying this request.[8] 362 So.2d at 1324-25. We find that the presumption of correctness required by section 2254(d) is not applicable to this holding by th state appellate court. A federal court is not bound by a state appellate court's determination of a question of law or of

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8. In its written opinion, the Alabma Court of Criminal Appeals stated that "the record does not show that defendant ever unequivocally requested a continuance." 362 So.2d at 1324. Noting that a request for continuance did not required any particular formality, the court stted that the request "should have been more definite than that shown on the record." Id. Finally, the court stated that:

> Aside from any question whether defendant sufficiently invoked a ruling continuing the case, the Court cannot be held in error for not continuing it. A continuance of a criminal case by reason of the absence of some defense witness is left to the sound discretion of the trial court and is not reversible on appeal unless a clear abuse of discretion is positively shown. Id.

a mixed question of law and fact. E.g., Cuyler v. Sullivan, 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714-1715, 64 L.Ed.2d 333 (1980); Panzavacchia v. Wainwright, 658 F.2d 337, 339 (5th Cir. 1981). Whether certain statements are sufficiently definite to constitute a request for continuance is, at the least, a mixed question of law and fact. A trial judge's discretionary power to deny a motion for continuance is necessarily limited by the Sixth Amendment right to compulsory process and any denial of an accused's attempt to present testimony in his behalf must be weighed against that right. United States v. Davis, 639 F.2d 239, 244 (5th Cir. 1981). The determination of whether the denial was such an abuse of discretion as to violate an accused's Sixth Amendment right is a question of law. Hicks v. Wainwright, 633 F.2d 1146 (5th Cir. 1981). Thus, it

is necessary for us independently to apply the constitutional standards to the facts in this case and decide the appropriate questions of law.

[7] We conclude that the statements made by defense counsel were sufficient to constitute a request for continuance in this case. Before trial, Dickerson properly subpoenaed a man named Echols who was employed as a police officer in the city of Anniston, Alabama.[9] When Echols failed to appear on the day the trial was to begin, defense counsel informed the court that he could not announce ready until this witness appeared. When Echols again failed to

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9. In fact, Dickerson attempted to secure the attendance of four alibi witnesses at trial. Echols was the only one served with a subpoena. Two of the other witnesses apparently could not be found even though they operated well-known businesses near the city of Anniston. In this appeal, Dickerson relies on the failure to compel the attendance of Echols.

appear on the following day, the court issued an attachment for him. Again, defense counsel stated that he could not announce ready until Echols arrived. The court then stated:

> Well, we passed the matter over from yesterday until today to try to get them line up and get them here. The circumstances of the case situation which you are aware of demands that that case be tried this term of court; and we'll do everything within the power of this court to get these people here. Any suggestion that you have at this time or later on,-

362 So.2d at 1324. The state then called its only witness, the robbery victim, who testified that the drugstore had been robbed at approximately 4:45 p.m. on July 16, 1977. Defense counsel then called three witnesses, Dickerson's brother and sister-in-law and an old family friend, who testified that Dickerson was with them in Anniston, Alabama at various times between approximately 1:00 and 4:00

p.m. on teh day of the robbery. At least one of these witnesses also testified that Anniston is located nearly one hundred miles away from Scottsboro. At the conclusion of this testimony, defense counsel state:

> Judge, those other two material witnesses, we haven't been able to, I don't feel like we can rest until we have the testimony of those witnesses. I realize they couldn't find tow of them; but Echols is material. Other than those, we would be able to rest.

Id. Although defense counsel might have clairified his request at this point in time, the court made clear its position by stating:

> Well, I don't know really anything further we could do unless we just held the case upen forever, you know. And, of course, we can't do that.

Id. Under these circumstances, we must conclude that, as a matter of law, defense counsel made a sufficiently definite request for continuance to

elicit a ruling from the state court. Therefore, we must determine whether the denial of this request for continuance violated Dickerson's constitutional rights.

III. DENIAL OF COMPULSORY PROCESS.

The constitutional right of the accused to have compulsory process to obtain witnesses in his defense is well established. See, e.g., Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); United States v. Melchor Moreno, 536 F.2d 1042 (5th Cir. 1976). Holding this Sixth Amendment right to be applicable in state proceedings, the Supreme Court in Washington noted:

> The right to offer testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense.... This right is a fundamental element of due process of law.[10]

388 U.S. at 19, 87 S.Ct. at 1923.

[8] Not every denial of a motion for continuance to obtain witnesses violates the accused's right to compulsory process. See, e.g., McKinney v. Wainwright, 488 F.2d 28 (5th Cir.), cert. denied, 416 U.S. 973, 94 S.Ct. 1998, 40 L.Ed.2d 562 (1974). A court may not, however, refuse to grant a reasonable continuance for the purpose of obtaining defense witnesses where it has

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[10] Subsequent cases have sometimes referred to this right as a due process rights without reference to the Sixth Amendment. E.g., Webb v.Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972); United States v. Hammond, 598 F.2d 1008 (5th Cir. 1979); but see Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

been shown that the desired testimony would be relevant and material to the defense. Hicks v. Wainwright, 633 F.2d 1146 (5th Cir. 1981); Singleton v. Lefkowitz, 583 F.2d 618 (2d Cir. 1978). In Hicks this Court recently enunciated several factors which are to be considered in determining whether an accused was deprived of his right to compulsory process by a denial of a motion for continuance:

> [T]he diligence of the defense in interviewing witnesses and procuring their presence, the probability of procuring their testimony within a reasonable time, the specificity with which the defense is able to describe their expected knowledge or testimony, the degree to which such testimony is expected to be favorable to the accused, and the unique or cumulative nature of the testimony.

633 F.2d at 1149 (quoting United States v. Uptain, 531 F.2d 1281, 1287 (5th Cir. 1976) (footnotes omitted)).

[9] In this case, each of these factors weighs in favor of the defendant. The record indicates that Dickerson's counsel exercised due diligence in attempting to procure the presence of Echols at trial. Echols was properly subpoenaed before trial and his failure to appear was noted by defense counsel. A writ of attachment was then issued. Thus, Echols' absence can more easily be attributed to the state's failure to enforce the writ of attachment and to arrest the police officer than to any lack of diligence on the part of Dickerson's counsel. Furthermore, it would appear highly probable that the attendance of Echols, a police officer in a neighboring city, could have been secured within a reasonable time. No ex-

planation was offered for the failure to have him arrested.

The State contends that Dickerson failed to make a sufficient showing that the witness would provide favorable evidence which would not be cumulative of the testimony by other defense witnesses. Based on our review of the trial transcript, we find this contention to be wholly without merit. Indeed, defense counsel identified Echols as a police officer as the time the attachment for Echols was issued. And the testimony of Dickerson's brother-that he and Dickerson were seen by Echols in another city shortly before the crime occurred-presented the court with a clear indication of the type of evidence sought

to be presented by defense counsel.[11] The testimony of a credible alibi witness would, of course, have been highly relevant to Dickerson's defense. Furthermore, such testimony by a police officer could not be considered cumulative of

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11. In its opinion, the Alabama Criminal Court of Appeals noted:

> The Court was never apprised of exactly what the defendant expected to show in evidence [by this witness], but it is clear that he proposed to show..that [he] saw defendant in the area of Anniston, Alabama on the afternoon of the robbery in Scottsboro, nearly one hundred miles away.

362 So.2d at 1326. However, this opinion omits any reference to the fact that Echols was a policeman or tht the other defense witnesses were Dickerson's friends and relatives. In light of these additional facts, we believe that Dickerson's counsel made a sufficient showing of they type of evidence sought to be presented by this witness. A defendant cannot realistically be expected to show "exactly" what the witness' testimony would be. See Singleton v. Lefkowitz, supra.

similar testimony by Dickerson's relatives and friends.[12] It is only reasonable to suppose that such testimony by a police officer would have lent a new aura of credibility to Dickerson's alibi defense. Thus, we conclude that the failure by the trial court to grant a continuance to allow Dickerson the opportunity to compel the presence of a credible alibi witness violated Dickerson's Sixth and Fourteenth Amendment rights to compulsory process.

The State of Alabama does not even attempt to argue that the harmless error

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12. This is especially true where, as here, the Alabama appellate court found that these witness;

> imprecision as to the time that defendant was out of their view... constitutes a predicate for a reasonable...conclusion [by the jury] that there was no irreconcilable conflict betwen their testimony and that of the victim of the robbery as to the time it occurred.

362 So.2d at 1326.

rule should apply to this case. We note that even if this rule applies, we could not conclude beyond a reasonable doubt that Dickerson was not prejudiced by the failue to compel the attendance of a credible alibi witness. United States v. Hammond, 598 F.2d 1008 (5th Cir. 1979); United States v. Melchor Moreno, 536 F.2d 1042 (5th Cir. 1976).

Amendment rights, it is not necessary for us to address the other issues raised on appeal. We note, however, that the district court erred in failing to grant an evidentiary hearing on the issue of whether the juror who typed the investigating officer's report prior to the trial in this case had an extrinsic knowledge of the case. Both the federal habeas corpus statute, 28 U.S.C. §2254 (1966) and the doctrine of Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), require a

district court to hold an evidentiary hearing where there are facts in dispute which were not fully and adequately developed at the state court trial. See Guice v. Fortenberry, 661 F.2d 496 (5th Cir.1981). Since the parties in this case disagree as to the possibility that Mrs. Davis read and remembered the report while serving as a juryor as well as to the contents of the report, an evidentiary hearing should have been held. It will not be necessary for the district court to hold such a hearing on remand, however, since we reverse on other grounds.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUT

NO. 80-7780

HOWARD L. DICKERSON,

Petitioner,

versus

STATE OF ALABAMA,

Respondent.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORHTERN DISTRICT OF ALABAMA

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion February 16, 1982, 11 Cir., 198_, _____F.2d _____).

Before TUTTLE, HENDERSON and HATTCHETT, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be

polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Hon. A. Henderson
UNITED STATES CIRCUIT JUDGE

APPENDIX C

28 UNITED STATES CODE 2254

§2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the grounds that he is in custody in violation of the Constitutional or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of

circumstances rendering such process ineffective to protect the right of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by an available procedure, the question presented.

(d) In an proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State courtof competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate

written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit -

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adquately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding; (5) that the applicant was an indigent and

the State court, in deprivation of his constitutional right, failed to appoint counsel to prepresent him in the State Court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State Court proceeding; (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as

provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one of more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes prusuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to

establish by convincing evidence that the factual determination by the State was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or othre reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances

what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

APPENDIX D

HOWARD LUTHER DICKERSON

v.

STATE.

8 Div. 64

Court of Criminal Appeals of Alabama.

Oct. 3, 1978.

Defendant was convicted in the Circuit Court, Jackson County, W. Loy Campbell, J., of robbery, and he appealed. The Court of Criminal Appeals, Leigh M. Clark, Retired Circuit Judge, held that: (1) trial court did not err in not continuing trial due to absence of three defense witnesses; (2) failure of juror who was police department employee and typed investigating officer's report to respond to trial court's voir dire questions whether any juror had fixed opinion as to defendant's innocence or guilt and if any juror knew about facts of case did not prejudice defendant and

(3) prosecutor's use of term "cold-blooded" in describing robbery did not require mistrial.

Affirmed.

1. Criminal Law 594(1)

Trial court could not be held in error for not continuing case due to absence of three defense witnesses who could not be located by sheriff, particularly in light of fact that defendant presented defense witnesses without referring to absent witnesses and mentioned matter of absent witnesses only at conclusions of evidence.

2. CriminalLaw 594(1), 1151

A continuance of a criminal case by reason of absence of some defense witnesses is left to sound discretion of trial court and is not reversible on appeal unless clear abuse of discretion is positively shown.

3. Criminal Law 1166.16

That juror who was police department employee and typed police report dealing with defendant's case failed to answer trial court's voir dire questions whether any juror had fixed opinion as to defendant's guilt or innocence or knew anything about facts of case could not be deemed prejudicial so as to require new trial, absent showing that contents of report were prejudicial to defendant and that defendant would have challenged juror if he had known she typed police report.

4. Criminal Law 703

Prosecutor's opening argument remark questioning alibi witnesses who stated they ahd seen defendant at different times in city 100 miles away from site of robbery and stating that jury, even if it believed every alibi witness, could not be told that defendant was not present at

time of robbery did not warrant mistrial where alibi witnesses' imprecision as to time defendant was out of their view on afternoon of robbery constituted predicate for reasonable conclusion that there was no irreconcilable conflict between alibi testimony and robbery victim's testimony as to time of robbery.

5. Criminal Law 1171.1(3)

Prosecutor's use of word "cold-blooded" in describing charged robbery was not so prejudicial as to require mistrial.

Finis Royal, Scottsboro, for appellant.

William J. Baxley, Atty. Gen. and Eddie Hardaway, Jr., Asst. Atty. Gen. for the State, appellee.

LEIGH M. CLARK, Retired Circuit Judge.

A jury found defendant-appellant guilty of robbery and fixed his punishment at thirty years imprisonment. He was entenced accordingly.

The only witness for the State was Eugene McCamy, who testified that about 5:00 p.m., July 16, 1977, defendant came into the drug store of witness in Scottsboro and while asking about some articles of merchandise, grabbed McCamy, placed his left arm around McCamy's neck and said,"If you do what I tell you, you won't get hurt. I want all of your Class A." He said defendant placed a gun in McCamy's side, picked up a box off the floor, and instructed McCamy to fill it with some Class A drugs. McCamy did so, Dickerson left the store with the drugs and McCamy then called the police.

Appellant does not contend that the evidence does not present a jury issue, but he insists that the fact that there

was only one witness against him emphasized the likelihood of an unjust result by reason ofvarious errors of the trial court eithr on the trial or in its denial of defendant's motion for a new trial.

Defendant was represented on the trial by retained counsel. After his conviction, he was determined in indigent, and counsel was appointed for him on appeal. Themotion for new trial was filed by his appointed counsel, which the court denied after a hearing thereon, in which evidence was taken.

Appellant urges that the trial court "abused its discretion when it refused to grant a continuance in this case."

The record does not show that defendant ever unequivocally requested a continuance. When the case was called for trial, the State announced that it was ready, and defendant's counsel said,

"Judge, I neeed to call my witnesses." Defendant's witnesses were then called for the trial of the case, and defendant's counsel then said:

> "Judge, due to our defense in this matter, I couldn't announce ready without those witnesses. I would like to find out if they were definitely served by calling the Sheriff down there and get a arrest order or something."

The court was then recessed to allow defendant's counsel time to make phone calls concerning these witnesses. Upon reconvening, defendant's counsel said:

> "Judge, it shows the Sheriff's office reports Mr. George Echols was served yesterday, 3-20-78; Terry Haley has moved to Oklahoma; and they could not locate Mr. Ginn or Mr. Spurlin at the address, which, well, I can't understand it because they run a business out on the highway there; it's well known to everybody, just outside of Anniston; and they are material witnesses for the defendant."

After further colloquy, the following occurred:

"[Defendant's Counsel]: Defendant couldn't announce ready until we could get those witnesses.
THE COURT: Well, we passed the matter over from yesterday until today to try to get them line up and get them here. The circumstances of the case situation which you are aware of demands that that case be tried this term of court; and we'll do everything within the power of this court to get these people here. Any suggestion that you have at this time or later on, -
"[Defenant's Counsel]: I would like for the record to show that the defendant has made every effort, also.
"THE COURT: If you will, issue an attachment for the witness George Echols of Anniston, Alabama, please. All right; Ladies and Gentlemen of the Jury, well, would you like for me to call the jury and have them identify themselves?
"[Defendant's Counsel]: Yes sir".

We do not say that the request or motion fo_ a continuance required any particular formality, but we thnk it should have been more definite than that shown by the record. There may be basis for some suspicion, at least, that,

although counsel was sincere in stating that he wanted the missing witnesses,he chose for the trial to be commenced rather than to have it continued to a future date.

When the State concluded its testimony and rested, defendant moved to exclude the evidence. The motion was overruled, and defendant proceeded immediately, without referring to the absent witnesses, to present defendant's witnesses and testimony. At the conclusion thereof, defendant again mentioned the matter of absent witnesses and stated:

> "Judge, those other two material witnesses, we haven't been able to, I don't feel like we can rest until we have the testimony of those witnesses. I realize they couldn't find two of them; but Echols is material. Other than those, we would be able to rest."

The Court then stated,

> "Well, I don't know really anything further we could do unless we just held the case open forever, you know. And, of course, we can't do that."

Defendant's counsel then stated,

> "Could I recall Mr. Danny Dickerson?"

And the court said,

> "Yes, sir."

After the testimony of Mr. Danny Dickerson on recall, defendant's attorney announced, "defendant rests, Your Honor." There was then no request for a continuance or any further time to obtain the absent witnesses. The State then announced that it had nothing further, and after a short recess, argument of counsel proceeded, the court charged the jury, and the jury commenced deliberations.

[1,2] Adied from any question whether defendant sufficiently invoked

a ruling continuing the case, the court cannot be held in error for not continuing it. A cotinuance of a criminal case by reason of the absence of some defense witnesses is left to the sound discretion of the trial court and is not reversible on appeal unless a clear abuse of discretion is positively shown. Hillyer v. State, Ala.Cr.App., 351 So.2d 646, cert. denied, Ala., 351 So.2d 648 (1977); Henry v. State, 57 Ala.App. 383, 328 So.2d 634 (1976).

A Mrs. Davis, an employee of the Scottsboro Police Department, was a member of the jury. In interrogating the jury venire from which the jury was selected to try the case, the court asked them, inter alia, whether (1) any of them had a fixed opinion as to the guilt or innocence of the defendant that would bias their verdict, and (2) if they knew anything about the facts of the

case. It appears that the juror Mrs. Davis made no response to either question.

During interrogation by defendant's counsel of th jury venire, he asked, "Do any of you know or are you related to Mr. Clarence Bolte, a policeman?" Mrs. Davis answered, "I know him; I'm Mrs. Davis." Counsel for defendant then said, "Mrs. Davis, you work for the Police Department? Thank you." Officer Clarence Bolte was not called as a witness for the State. He testified on call of the defendant. His testimony was to the effect that he investigated the robbery promptly after it occurred, talked with Mr. McCamy, attempted to make some fngerprint tests on the scene which were unsuccessful and that he did not find any witnesses to the robbery, other than Mr. McCamy.

Appellant relies largely upon the often cited case of Leach v. State, 31 Ala.App. 390, 18 So.2d 285, cert. denied, 245 Ala. 539, 18 So.2d 289, in which it was held:

> "On their voir dire examination and at the request of defenant, the jurors were examined and qualified as to whether or not any of them were serving or had previously served as a deputy sheriff, constable, policeman or other law enforcement officer. Two of the veniremen answered in the affirmative and were duly stricken from the list by the defendant. One juror, later accepted on the panel, did not answer and failed to disclose that he had previously served as a deputy sheriff of the county for about fifteen years. This fact was unknown to either the defendant or his counsel until after the trial, and, of consequence, defendant was denied the privilege of and failed in striking said juror from the panel selected to try the case, as he would have done had the juror disclosed his former official relations. Whether such concealment was deliberate or unintentional, on the part of the juror, need not be considered, insofar as the resultant prejudice to defendant be

concerned. Hayne New Trial & Appeal, Vol 1, Section 45, p. 144.

"Defendant urged the foregoing as prejudicial error in his motion for a new tiral and renews the argument here. We think it well taken.

On the motion for a new trial in instant case, defendant called Officer Bolte as a witness. He testified that Mrs. Davis was an employee of the Scottsboro Police Department. To the question whether the case was ever discussed in her presence, he replied, "I'm sure that it was because she typed my report."

The case before us is distinguishable from Leach, supra, in several respects. There is nothing to indicate in instant case that defendant would have challenged or stricken Mrs. Davis as a juror even if defendant and his attorney had known that she had typed the report made by Officer Bolte. There

is nothing to show that defendant and his attorney did not know or have good reason to believe, before the trial commenced or during the trial, that she typed the report. Whether the contents of the report were prejudicial to defendant is not shown. The one makeing the report found no evidence to indicate that defendant was guilty. The fact that defendant called Officer Bolte as a witness indicates, though it does not conclusively show, that defendant's counsel thought that Officer Bolte's information was more beneficial than detrimental to defendant.

In ruling on the motion for a new trial, the court indicated, but did not expressly hold, that there was no probable prejudice to defendant in any failure of Mrs. Davis to answer any of the questions addressed to the jury venire. In Freeman v. Hall, 286 Ala.

161, 238 So.2d 330, 335, (1970) as), it was held:

> "Neither Sanders v. Scarvey [284 Ala. 215, 224 So.2d 247]; Leach, nor the original opinion in the instant case, is authority for the proposition that on voir dire any failure of any prospective juror to respond properly to any question regardless of the excuse or circumstances automatically entitles a party to a new trial or reversal of the cause on appeal.
> "We hold that the proper inquiry for the trial court on motion for new trial, grounded on allegedly improper responses or lack of responses by prospective jurors on voir dire, is whether this has resulted in probable prejudice to the movant.

[3] We are of the opinion that there has been no showing of any probable porejudice to defendant by reason of any failure of Mrs. Davis to answer questions propounded to her and that there was o abuse of the discretion of the trial court in its ruling on the motion for a new trial as to the particular matter.

Alabama Power Co. v. Hussey, 291 Ala. 586, 285 So.2d 92, 96 (1973).

The court was never apprised of exactly what defendant expected to show in evidence by the three missing witnesses, but is is clear that he proposed to show by them that they saw defendant in the area of Anniston, Alabama, on the afternoon of the robbery in Scottsboro, nearly one hundred miles away. Three witnesses for defendant so testified in support of his claim of an alibi. Each of them said that appellant was in the Anniston area then about an hour or an hour and a half before 5:00, the time of the robbery, and one of them said he was in the Anniston area before dark theday of the robbery. During the opening argument of counsel for the State, he said:

> ". . . I am questioning the fact they "the alibi witnesses for defendant] have come up here and asked you to believe this hogwash about them being

> down there at all these different times. As a matter fact, even if you believe every one of them, I don't think there's anybody in here that could tell you the defendant wasn't up here at 5:00 that afternoon robbing this store."

Thereupon, counsel for defendant said:

> "Judge, I'm going to make an objection to what thelawyer thinks; it's not his province to think; it's the jury's. We move for a mistrial."

The court replied:

> "That is right; the lawyer can only argue inferences that he draws from the testimony, and that is the only thing he can argue; overrule your motion."

[4] The overruling of the motion for a mistrial was not error. Defendant's counsel obtained from the statement of the court all of that to which defendant was entitled. The testimony of the witnesses, if true, indicated that it was hardly probable that defendant could have been at Scottsboro at the time of the robbery, but their imprecision as to the

time defendant was out of their view the afternoon of the robbery constitutes a predicate for a reasonable, if not absolutely certain conclusion that there was no irreconciliable conflict between their testimony and that of the victim of the robbery as to the time it occurred. The court was not in error in overruling defendant's motion for a mistrial.

We thin also that the court was not in error in overruling another motion for a mistrial based on argument of State's counsel that the robbery was "cold-blooded."

[5] The term "cold-blooded" or "cold-blood' in criminal cases is usually associated with the crime of homicide, as to which it means "a willful, deliberate, and premeditated" homicide. Skeggs v. State, 24 Ala.App. 307, 135 So. 431, cert. denied, 223 Ala. 221, 135 So. 433 (1931). It is clear, however, that

State's counsel was not attempting to equate the crime of robbery with that of murder in the first degree or of injecting in any way real blood into the case, but was using the term "cold-blooded" in its generally accepted sense oflacking "insensibility, feeling, or consideration." Webster's New Second International Dictionary. The circumstances of the robbery from the standpoint of the prosecution justified the characterization given it by counsel. At any rate, there was nothing blood-curdling in the use of the work and nothing so ineradicably prejudicial as to justify a mistrial. The court was not in error in overruling defendant's mmotion therefor.

Defendant's motion for a new trial did not contain any grounds relative to any of the argument of counsel for the State or the court's action with

reference to such argument, but it did include grounds as to the absent witnesses and as to the presence on the jury of Mrs. Davis, which the court, by its written order overruling the motion for a new trial, evinced its careful consideration. For the reasons stated in our consideration of the questions arising on the trial, there was no error in the court's overruling defendant's motion for new trial.

We find no error in the record and the judgment appealed from should be affirmed.

The foregoing opinion was prepared by Retired Circuit Judge Leigh M. Clark, serving as a judge of this Court under the provisions of §6.10 of the New Judicial Article (Constitutional

Amendment No. 328). His opinion is hereby adopted as that of the Court. The judgment below is hereby

AFFIRMED.

All the Judges concur.

CERTIFICATE OF SERVICE

I, Elizabeth Ann Evans, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Atorneys for State of Alabama, Petitioner, do hereby certify that on this 28th day of May, 1982, Idid serve the requisite number of copies of the foregoing on the Attorneys for Howard Luther Dickerson, Respondent, by mailing same to them, first class postage prepaid and addressed as follows:

B. G. Minisman, Jr.
FULFORD, POPE & MINISMAN
2326 Highland Ave.
Birmingham, Alabama 35025

Elizabeth Ann Evans

ELIZABETH ANN EVANS
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:
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SUPREME COURT, U.S.

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF ALABAMA,
Petitioner

v.

HOWARD LUTHER DICKERSON,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

R. CLIFFORD FULFORD
FULFORD, POPE, NATTER, DONOVAN & MULLINS
2326 HIGHLAND AVENUE
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(205)252-8473

ATTORNEYS FOR RESPONDENT

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428 U.S. 106 (1976) 2

United States ex rel Kellogg v. McBee
452 F.2d 134 (7th Cir. 1971) 2

SUMMARY OF THE ARGUMENT

A federal appellate court may supplement the record on appeal in order to fairly and efficiently dispose of the issues before it.

ARGUMENT

Petitioner asserts that there is a conflict between the Circuit Courts of Appeal as to whether a federal appellate court may supplement the record on appeal with evidence not before the federal district court. The two cases cited by Petitioner to support its argument that a federal appellate court may not so supplement the record are insufficient authority for Petitioner's assertion.

In U. S. ex rel Kellogg v. McBee, 452 F.2d 134 (7th Cir. 1971), the Court simply held that judicial review of the decision of a local administrative board is limited to the record made before the board, and that Rule 10(e) of the Federal Rules of Appellate Procedure was not sufficient authority for abrogating that well settled point of law. Ayers v. Ciconne, 431 F.2d 724 (8th Cir. 1970) is inapplicable to the issue before the Court. On a direct habeas appeal, the Court held that the appeal was moot in light of the fact that Appellant had not attacked the validity of the underlying conviction, and was no longer confined by Appellee.

Neither of the two noted cases, nor any other cited by Petitioner, states that it is beyond the power of a federal appellate court to supplement the record on appeal. In fact, no federal appellate court has disputed the holding of this Court in Singleton v. Wulff, 428 U.S. 106 (1976), that the matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the Court of Appeals. Accordingly, there is no conflict among the Circuit Courts of Appeal.

In the instant case the Eleventh Circuit undertook to review the state trial transcript upon which Respondent's original habeas petition had been based. It held that, as a matter of law, Respondent's right to compulsory process had been violated. To remand the case to the district court for an evidentiary hearing, as Petitioner asserts was necessary, would have been an exercise of futility and judicial inefficiency. The key point was not what testimony would have actually been elicited from the missing witness, but what Respondent had shown at the trial in order to warrant the continuance to procure such testimony. It is apparent, therefore, that Petitioner's arguments are without merit, and the Petition should be denied.

CONCLUSION

By virtue of the foregoing, Respondent respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully Submitted,

R. Clifford Fulford
R. CLIFFORD FULFORD

Mark E. Hoffman
MARK E. HOFFMAN

CERTIFICATE OF SERVICE

I, R. Clifford Fulford, attorney of record for Respondent, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this 9th day of July, 1982, I did serve the requisite number of copies of the foregoing on the attorneys for the Petitioner, Charles A. Graddick and Elizabeth Ann Evans, by mailing same to them, first class postage prepaid and addressed as follows:

Charles A. Graddick
Elizabeth Ann Evans
Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

R. Clifford Fulford
R. CLIFFORD FULFORD
Attorney for Respondent

Address of Counsel:

R. Clifford Fulford
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81-2206

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STATE OF ALABAMA,
Petitioner

v.

HOWARD LUTHER DICKERSON,
Respondent

Case Number 81-2206

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, by and through his undersigned attorneys, respectfully moves this Honorable Court to grant his Motion to Proceed in Forma Pauperis, and as grounds therefore states the following:

1. Respondent's Motion to Proceed in Forma Pauperis in the Eleventh Circuit Court of Appeals was granted by said Court, and Respondent was represented throughout his appeal to said Court by the undersigned attorneys.

R. Clifford Fulford
R. CLIFFORD FULFORD

Mark E. Hoffman
MARK E. HOFFMAN

Attorneys for Respondent

Address of Counsel:

R. Clifford Fulford
FULFORD, POPE, NATTER DONOVAN & MULLINS
2326 Highland Avenue
Birmingham, Alabama 35205
(205)252-8473

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing upon Charles Graddick and Elizabeth Ann Evans, by mailing a copy of same via United States mail, first class postage prepaid on this the 9th day of July, 1982.

R. Clifford Fulford
R. CLIFFORD FULFORD
Counsel